



# Planning and Land Use Services

Building ▪ Health ▪ Historic District Commission ▪ Planning Board ▪ Zoning Board of Appeals

## STAFF REPORT

Date: June 7, 2016

To: Zoning Board of Appeals

From: Eleanor W. Antonietti  
Zoning Administrator

Re: June 9, 2016

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### I. APPROVAL OF THE MINUTES:

Pages 5 - 11 ▪ May 11, 2016

### II. OLD BUSINESS:

See Packet  
Parts I & II

- 04-16 Donald J. Mackinnon, Trustee of Nantucket 106 Surfside Realty Trust – *a/k/a* SURFSIDE COMMONS 40B 106 Surfside Road Mackinnon  
Extended Close of Public Hearing deadline September 30, 2016 (180 days from Initial Public Hearing with Extension)  
Decision Action deadline November 10, 2016 (40 days from close of Public Hearing)  
Conflicts: Geoff Thayer Sitting Members: ET LB MJO KK SM Alternates: JM MP

#### **FROM PREVIOUS STAFF REPORTS:**

The application requests numerous and wide-ranging waivers, from zoning standards, various permitting requirements, and financial obligations to the Town. The Board will need to get clarification on these waivers (i.e. Building Permit; Water Commission; Sewer Commission; DPW permits & fees; HDC approval ...). Approval will require substantial modifications as to matters of density, massing, design, screening, layout, parking configuration, all of which relate to the public health and welfare and overall safety of the community. The ability to connect to the local sewer, which may not even be able to support the proposed density, is the lynchpin to any approval. Town Counsel and the applicant disagree as to whether or not Town Meeting approval is required. We expect further testimony and written opinions from Town Counsel on this subject.

There are **OPTIONS TO BE EXPLORED RELATIVE TO VARIOUS DESIGN CONCERNS.**

- HEIGHT The applicant could, for example, alter the design by creating garden-level apartments as opposed to full-basements. This would potentially minimize the mass of the building above 30-feet. They could also taper the roofline of dormers at a 30 foot height while allowing gable pitch above the 30-feet, or propose a mansard roof. In short, there are alternative designs to mitigate height that may be contemplated and suggested by the Board.
- DENSITY
  - The pool and fitness club, currently proposed as a separate building, could be incorporated in one of the apartment buildings at basement level. This would allow buildings to be more centrally located and increase buffers to surrounding properties.
  - Interior layout could be reduced by consolidating interior space (removing dens or 2<sup>nd</sup> full-bathrooms or walk-in closets). There could be more micro-units, or a different mix of units to accommodate smaller households.
- AESTHETICS
  - Balconies are a problematic design feature, although less so on the rear of the building where they are less visible. They are not found in any residential-style or multi-family buildings on island. An alternative could be a simple community outdoor space or perhaps roof decks.
  - The window and door arrangements are disorganized. There is a double gable facing Surfside Road. The rear façade of the 13-unit building seems to have more architectural continuity and should perhaps be replicated with the other buildings/elevations where possible.
- SCREENING Perimeter planting should be detailed with species comprised of a mixture of deciduous and coniferous plants to maximize a solid screen to abutting properties. Would solid board fencing on north and south perimeter be suitable screening, or would that involve too much maintenance ?
- PARKING Where possible, some of the parking could be located underground to move some of the surface-level parking from site.
- ON SITE TRAFFIC FLOW A one-way loop to keep incoming traffic separate from outgoing traffic could improve flow, site lines and visibility. Adding another access on west side of 13-unit building could be efficient.
- TRAFFIC MITIGATION
  - The community would benefit from a bike-path extension from Fairgrounds Rd. to front of this site to eventually connect to future bike path on northern side of Boulevard a bit further down Surfside Rd.
  - TRAFFIC STUDY (SEE Pages 53 – 75 of Packet Part I). Specifically, see Page 73 (or Page E-20 of the Traffic Study) regarding the deficient intersection. The Board could ask the applicant to pay for 3% (approximately \$30,000) of the cost of installing a round-about at the Fairgrounds and Surfside Rd. intersection.
- MISCELLANEOUS
  - Storage units will need to be restricted to residents only.
  - There is only one Dumpster which may not be adequate for the proposed density.
  - Are there elevators?

The Board formally requested WRITTEN COMMENTS AND RECOMMENDATIONS FROM OTHER TOWN BOARDS which include:

- DPW
- Planning Board
- HDC
- Board of Water Commissioners
- Board of Health

Staff has obtained funds from the applicant and set up an Engineering Escrow account (53G) to cover costs of PEER REVIEW FROM:

- Traffic Study consultant to Town, Tetra Tech
- Engineering consultant, Ed Pesce
- 40B consultant, Edward Marchant

Staff has obtained Town approval of a Request for Legal Services from Town Counsel for as-needed WRITTEN OPINIONS on various matters, most prominently that of the sewer connection process.

This application was continued from January to April hearing. A SITE VISIT took place on March 29<sup>th</sup> at which the applicant prepared the site with 'height balloons' and stakes and gave a detailed description of how the buildings will be situated on the locus.

#### **REVISED LIST OF WAIVER REQUEST:**

An updated list was received from the Applicant on 4/6. (See Pages 29 - 32 in Packet Part II.) Essentially, the revisions involve refinement and specification of waivers from Zoning By-law Sections :

- 139-16.A Intensity and dimensional requirements
- 139-17 Height limitation – proposed height is 55 feet
- 139-18 Parking – dimensional requirements as to parking space length
- 139-19 Screening requirements
- 139-26 WAIVER REQUEST eliminated

#### **SEWER WAIVER:**

There is a Memo (See Pages 148 - 156 in Packet PART II) received from the Applicant on 4/6 regarding the requested Waiver to allow applicant to connect to the existing sewer line *via* a new force main to be installed along Surfside Road & Fairgrounds Road. Applicant seeks to bypass the requirement to be able to do so by virtue of **both** approval at a Town Meeting and by the BOS acting as the Sewer Commission. Applicant asserts that, "Pursuant to Chapter 40B, the ZBA has the authority and exclusive jurisdiction to grant the Waiver" [...] "by issuing a comprehensive permit." Essentially, the applicant affirms that to deny the applicant the right to connect to the sewer district through a Waiver of the above-referenced statutory requirement would undermine the purpose and intent of Chapter 40B "*to reduce regulatory barriers that impede the development of [affordable] housing.*"

There is also a legal opinion letter (See Pages 158 - 161 in Packet PART II) provided by Town Counsel on April 13<sup>th</sup> written in response to the above-referenced Memo.

#### **WRITTEN COMMENTS & RECOMMENDATIONS FROM OTHER TOWN DEPARTMENTS:**

Comments from Town Departments, Boards, and Commissions are included in your packet (See Pages 129 - 146 in Packet PART II). The letter submitted and signed by the BOS recommends that a Comp. Permit for the project be granted with certain conditions and goes on to raises 7 salient points:

1. Sewer District Issues
2. Sewer Costs
3. Water Infrastructure
4. Wellhead Protection District Issues
5. Public Safety Issues
6. Design Issues
7. Other Important Issues

Staff has not yet received comments and recommendations from the Planning Board or the NP&EDC. The Conservation Commission noted that the project is located outside of the Commission's jurisdiction and therefore, they have no specific recommendations at this time other than that proper handling of sewage, storm and surface waters is important and they would encourage that the design and construction of the potential development take that into account.

**APPLICANT'S REPLY TO COMMENTS & RECOMMENDATIONS FROM TOWN DEPARTMENTS:**

Applicant emailed a Memo (See Pages 153-156 in Packet PART II) received, 4/11. This Memo succinctly addresses the first 6 of the above-referenced points outlined in the BOS letter.

**UPDATE:**

**PEER REVIEW TRAFFIC REPORT:**

A traffic engineer from Tetra Tech did attend the Site Visit on 3/29, accompanied by Transportation Planner, Mike Burns who also gave her a tour of the area. There has been discussion of an option proposed by the Fire Dept for a 2<sup>nd</sup> driveway access that would also incorporate a one-way circulation pattern within the development. This was in response to the concern that Fire Dept vehicles would not be able to make turns within the development given the 2-way flow and narrow turning radii. There is also a concern regarding parallel parking within the circulation aisles if parking was ultimately inadequate for the site. Perhaps recommending "no parking" signage or pavement markings within the development could address this concern. One Board member voiced concerns about the intersection between Buildings C & B & E where there is also a playground. Cars and trucks would be backing into that entrance/exit area, which seems contrary to sound traffic and safety considerations.

The traffic study peer review required additional information from the applicant's traffic consultant (Bristol), which has been received. The Report submitted by Tetra Tech is on Pages 76-82 in Packet PART I. Bristol submitted a response to the report, found on Pages 83-87 in Packet PART I.

**POWER POINT PRESENTATION:**

No new full scale plans have been received, but the Applicant will be making another Power Point presentation at the hearing. The specific 'slides' are included in your packet and may be found on Pages 162 - 186 in Packet PART II. There are some **important potential/proposed changes** shown therein, including, but not limited to:

- Proposal to install an ON-SITE WASTEWATER TREATMENT SYSTEM (Amphidrome®) which would accommodate up to 100 bedrooms, down from the originally proposed 122;
- ALTERNATE SITE DESIGN:
  - decreasing # of apartments from 56 to 52
  - elimination of Clubhouse (Building "B")
  - reduction of grade alterations
  - more open space
  - elimination of front yard setback encroachment
  - additional entrance/exit on southwest of site
  - two possible design concepts with different building layout and unit distribution

**OTHER:**

No additional Abutter comment has been received but Staff has assiduously sought to keep them apprised of all new submissions or relevant information as it becomes available. This takes place through email and by posting all relevant documents on a dedicated page of the Town website.

See Packet  
Part III

Pages 13 - 47

- 10-16 MHD Partners Real Estate, LLC  
**WITHDRAWAL WITHOUT PREJUDICE**

4 Goose Cove Lane Brescher  
Sitting Members: ET LB MJO KK GT

**FROM INITIAL STAFF REPORT:**

This is similar to the application submitted in 2013 and again in 2015 for 47 Monomoy Road, with the important exception that this applicant is requesting relief before the relocation, whereas that applicant requested relief to validate the excess height after moving the dwelling from Baxter Road. No changes to the structure are proposed as part of this application. Once a structure is relocated – and this one will be moved from 43 Tennessee Avenue to one of the vacant lots in a 4-lot subdivision called Goose Cove located off of South Cambridge Street – it loses any pre-existing nonconforming status. If the Board is inclined to grant any relief, variance relief is the only option. Staff notes that the height of the structure is 25.5 feet and as such a *de minimis* difference as to the 25 feet allowed. Furthermore, this lot has a challenging shape and topography (it used to contain 2 tennis courts from the defunct Island Racquet Club) and has wetlands to the rear.

**VARIANCE CRITERIA**

The decision would have to meet the threshold (established by MGL 40A § 10 and locally per Section 139-32.A) which requires that the Board:

*[...] specifically finds that owing to circumstances relating to soil conditions, shape or topography of such land or structures but not affecting generally the zoning district in which it is located, a literal enforcement of the provisions of this chapter would involve substantial hardship, financial or otherwise, to the petitioner or appellant, and the desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of such bylaw.*

**5/11/16 Staff Report:**

The Board asked that the applicant furnish a Topographical plan to clarify the siting of the proposed Move-On structure as well as some proof of the historical elevations. The Board expressed concerns that the applicant was “manipulating the grade” by filling the lot to bring the existing elevation 6 up to a plateau at elevation 12, and in so doing, was not meeting the intent of the by-law regarding height.

Pursuant to Section 139-17.A:

*Building and structure height is measured as the average height of all sides of a building or structure from the average mean grade to the highest point of the building and/or structure. There shall be only one highest point for each building and/or structure. No one building and/or structure side shall exceed 32 feet\*.*

\*Pursuant to Section 139-12.K describing the VILLAGE HEIGHT OVERLAY DISTRICT:

*The purpose of this overlay district is to establish reduced building heights in certain locations in the Country Overlay District.*

*(1) Notwithstanding the provisions of Section 139-17, the maximum height permitted within the Village Height Overlay District shall be 25 feet.*

Applicant has complied with the Board’s requests by submitting 1) various letters addressing the Board’s expressed concerns – including a letter from the surveyor – and, 2) multiple plans showing topographical data, past (circa 1972 on Page 41) and present. (See Pages 35 – 44 of **Packet Part III**).

Staff is familiar with the site and on April 6<sup>th</sup> took some photos of the now vacant and partially filled lot (See Pages 30 – 33 of **Packet Part III**).

**UPDATE:**

Applicant has requested a **WITHDRAWAL WITHOUT PREJUDICE**. At the May 11<sup>th</sup> meeting, the Board took issue with the filling of the lot prior to seeking HDC approval or a Building Permit. There is the question of whether or not the by-law may be construed to allow for the filling of a lot. According to the Surveyor, the applicant was told by the ZEO that ground elevation is ‘existing grade’ which is why they moved forward with filling the site closer to the existing height of surrounding area. Therefore, the

Surveyor did not have an existing and proposed height averaged out, as one typically would. Furthermore, the Surveyor states that the area showed clear signs of having been excavated as there is no evidence of any top or sub soil in their soil pits.

The Board asked for either revised calculations that reflect averaging and/or verification that the ZEO's reading of the by-law is the new interpretation of grade. In response to the latter, there is an email from Zoning Enforcement Officer which states:

*"existing grade" can only be read as "the grade of the property at the start of development" (or "the application process," as it is referred to below, with "application process" being read broadly). And in this context, "start of development" means "once an application to develop a property is submitted for review."*

*Note that this reading is not restricted to "submitted for a building permit." The exchange below does not contemplate properties under pre-development review for subdivision, review by the Conservation Commission, special permit/variance, or the like. In such contexts, the existing grade would be established based upon representations made to the permitting agency, which would occur prior to submission of an application for a Building Permit.*

- 15-16 Madaket Wheelhouse, LLC

Action deadline August 9, 2016

13 Massachusetts Avenue Cohen

Sitting Members: ET SM KK JM GT

Applicant is seeking relief by Special Permit and Variance pursuant to Zoning By-law Sections 139-33.A and 139-32 in order to alter the pre-existing nonconforming dwelling and garage. Applicant proposes to build two dimensionally compliant additions to the dwelling and to enclose an outdoor shower to be sited .5 feet from the westerly lot line, increasing that pre-existing nonconforming side yard setback encroachment. Applicant also proposes changes to the garage consisting of moving, expanding, and converting it into a secondary dwelling. The Locus is situated at 13 Massachusetts Avenue, is shown on Assessor's Map 60 as Parcel 75, and as Lots 12-15, Block 29 upon Land Court Plan 2408-Y and unregistered land lying north of said Lots. Evidence of owner's title is registered on Certificate of Title No. 25696 at the Nantucket County District of the Land Court and in Book 1494, Page 39 on file at the Registry of Deeds. The site is zoned Village Residential (VR).

Pages 48 - 60

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### FROM PRIOR STAFF REPORT:

The property is improved with a dwelling and garage structure which are pre-existing nonconforming as to both side yard and front yard setbacks, but is conforming in all other respects. Applicant proposes to alter and expand both structures with small additions. The garage will be relocated such that the eastern side yard setback intrusion will be eliminated and the front yard setback intrusion will be reduced. The front yard setback cannot be cured due to the 10 foot scalar separation requirement for second dwellings.

The structures, as so altered, will not be any closer to the lot lines than they currently are, except for one of new outdoor shower enclosures – considered a “structure” – which will make the existing westerly side yard setback nonconformity worse. There are two new outdoor showers proposed, one on either side of the dwelling. The one on the east will be sited compliantly. The one on the west will be sited as close as .5 feet from the westerly lot line. Applicant states that the siting is restricted by wetland regulations.

A direct abutter submitted an email specifically in opposition to the above-referenced outdoor shower portion of the application. The comment was received today (after the deadline) due to delayed receipt of the notice because of an address change. The comment is:

*I live at 15 Massachusetts Ave in Madaket and our property abutts #13 We would like to protest the location of the new outside enclosed shower that the owners are planning to build right at our property line , which is too much of an encroachment to our property . This is also a noise nuisance for us and we want it relocated to the eastern side of the renovated dwelling.*

*Thank you for your consideration of this issue Carol Shiff*

*[...]Many thanks for your assistance.*

*Carol Shiff*



This is both a Special Permit, to alter pre-existing nonconforming structures, and a Variance (new outdoor shower enclosure) request. A favorable decision as to the latter would have to meet the threshold which requires that the Board:

*[...] specifically finds that owing to circumstances relating to soil conditions, shape or topography of such land or structures but not affecting generally the zoning district in which it is located, a literal enforcement of the provisions of this chapter would involve substantial hardship, financial or otherwise, to the petitioner or appellant, and the desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of such bylaw.*

### UPDATE:

At the May 11<sup>th</sup> hearing, applicant's representative explained that applicant had bought the property last summer. The prior owner had permission to put in new septic system and she took out a betterment loan but designer designed and installed it without proper permits. Meanwhile, the law changed such that the system was no longer legal and had to be ripped out and replaced with a tight tank, installed due to proximity to ocean. The main dwelling will have only an Outdoor Shower added as close a 1/2 foot from the lot line. There are strict rules about how much water flowage is allowed and the Board of Health has restricted the number of *en-suite* showers, thus an outdoor shower is proposed to compensate for inability to have desired number of indoor showers. It only counts as a structure for zoning purposes if it has a floor, which the applicant prefers. The Cottage/garage is proposed to be moved as much out of setbacks as possible and will be expanded with no change of use proposed. Overall ground cover will go up. The portion of the cottage which will remain within setback will be overhang and a small part of bldg. Representative requested continuance to this meeting to discuss either removing floor from ODS – thereby removing it from needed relief – or relocating it, depending on ConCom parameters. No new information has been provided by the applicant.

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- 16-16 Todd W. Winship & Elizabeth W. Winship and Bess W. Clarke, Tr., Sixteen Monohansett Road Trust  
16 Monohansett Road Brescher  
Action deadline August 9, 2016  
Sitting Members: ET LB SM MJO KK  
**CONTINUED TO JULY 14, 2016**

### III. NEW BUSINESS:

See Packet  
Part III

Pages 63 - 89

- 18-16 Janet Hanson 3 Pond Road Shalley  
Action deadline September 7, 2016  
CONFLICTS: NONE KNOWN  
Applicant is seeking modification of prior Variance relief in order to remove the condition that the second dwelling be restricted to year-round occupancy. Prior relief validated the siting of the garage structure within the front yard setback and the conversion of a portion of the garage into a second dwelling. No change in footprint is proposed. The Locus is situated at 3 Pond Road, is shown on Assessor's Map 56 as Parcel 151.1, and as Lot 132 upon Land Court Plan 14830-7. Evidence of owner's title is registered on Certificate of Title No. 23280 at the Nantucket County District of the Land Court. The site is zoned Residential 20 (R-20).

The property has been granted prior relief in 1995, 2003, and 2007. The locus was originally part of a larger parcel which was subdivided in 1984 into two lots, which resulted in frontage, originally taken from Hussey Farm Road, being moved to Pond Road. This rendered the garage structure, built in 1980, nonconforming as to 'front yard setbacks' (12.8 feet where 30 foot front yard setback is required), whereas it was previously conforming when Pond Rd. was the side yard.

In 1995, a prior owner was granted Variance relief to 1) validate the frontyard setback intrusion, and 2) approve the conversion of the 2<sup>nd</sup> floor of the nonconforming garage structure into an apartment, while maintaining the two-car garage space on the 1<sup>st</sup> floor. The following 2 conditions were imposed in this decision:

- a. The apartment shall be limited to year-round occupancy; and*

- b. The footprint of the garage structure shall remain substantially unchanged, and that any additions to allow for second floor access and dormers shall be made outside of the 30-foot setback area.*

In 2003, another prior owner obtained approval to modify said Variance in order to convert one of the two 1<sup>st</sup> floor garage bays into additional living space for the 2<sup>nd</sup> floor apartment. This decision retained the prior conditions and added a 3<sup>rd</sup> which was:

- c. The apartment shall be limited to a single bedroom.*

In 2007, same prior owners requested and received further relief to allow the conversion of the entire garage structure into a second dwelling. However, this decision was neither recorded nor exercised and the Building Permit originally pulled for said relief was voided. The prior conditions were retained, with the exception that condition 'c' was slightly modified to read:

- c. The secondary dwelling shall be limited to a maximum of one bedroom without further relief from this Board.*

Applicant purchased the property in 2009 and has made some modest improvements to the dwelling and garage apartment, but nothing that required additional relief or modification thereto. The applicant is requesting to remove only the year-round occupancy condition.

There are three letters of opposition in your packet (See Pages 86 – 89 of **Packet Part III**).

- 19-16 John Udelson 12 Pond View Drive Brescher  
Action deadline September 7, 2016 CONFLICTS: MP  
Applicant is seeking relief by Variance pursuant to Zoning By-law Section 139-32 for a waiver of the ground cover ratio provisions in Section 139-16. Specifically, applicant seeks to validate the various structures upon the premises already granted Certificates of Occupancy but shown on most recent As-Built survey to have a total ground cover ratio of 4.1% where 4% is maximum allowed. The Locus is situated at 12 Pond View Drive, is shown on Assessor's Map 81 as Parcel 9, and as Lot 10 upon Land Court Plan 36550-C. Evidence of owner's title is registered on Certificate of Title No. 25177 at the Nantucket County District of the Land Court. The site is zoned Limited Use General 2 (LUG-2).

Applicant's representative has provided a very detailed narrative of the history of the property according to Building Dept. records and the reason for the Variance request (See Pages 93 – 95 of **Packet Part III**). It ultimately boils down to discrepancies among different surveyors. Current owner/applicant purchased property in 2015 and sought to construct a pool and decking, resulting in no change to ground cover, previously shown to be less than the maximum allowed 4%. A survey was commissioned and done by an established island surveyor in order to close out the pool permit. This survey shows that the structures (garage/office, primary and secondary dwelling – shed is ≤ 200 SF so does not count) upon the locus have an overall ground cover that exceeds the allowable 4%. Pursuant to the 6-year Statute of Limitations (MGL Ch. 40A § 7), the dwellings are protected from "removal, alteration, or relocation" as they were issued Certificates of Occupancy based on prior As-Built surveys which showed full dimensional compliance. In essence, said statute protects "a use allowed by said permit and a structure erected in reliance upon said permit." (quoting Bobrowski; Third Edition of *Massachusetts Land Use and Planning Law*) Nevertheless, the most recent As-Built shows that the locus is noncompliant, thus applicant seeks to validate the existing nonconforming ground cover of 4.1%.

- 20-16 Gerald T. Vento & Margaret Vento, Tr. of Ninety-One Low Beach Road Nominee Trust  
Action deadline September 7, 2016 3 Pond Road Cohen  
CONFLICTS: MJO  
Applicant is requesting Special Permit relief pursuant Zoning Bylaw Section 139-16.C(2) to validate unintentional side and rear yard setback intrusions. The siting of a tennis court, installed in 2012, was reasonably based on a licensed survey. The court is sited as close as 15.4 feet from the side yard lot line and 18 feet from the rear yard lot line, where a twenty (20) foot setback is required. In the alternative, and to the extent necessary, Applicant requests relief by Variance pursuant to Section 139-32 to allow said setback



intrusions. The Locus is situated at 91 Low Beach Road, is shown on Assessor's Map 75 as Parcel 31, and as Lot 912 upon Land Court Plan 5004-65. Evidence of owner's title is registered on Certificate of Title No. 24350 at the Nantucket County District of the Land Court. The site is zoned Limited Use General 3 (LUG-3).

The Locus is improved with a 2-story 3,182 SF primary dwelling, a 1,381 SF secondary dwelling/cottage, a pool and associated pergola, a 98 SF shed, and a tennis court for a total ground cover ratio of 2.97%± where 3% is allowed. The property is among the last 4 building lots at the end of Low Beach Road, a sand road. It is surrounded to the north by protected open land.

In 2012, the Applicant hired a contractor to install a clay tennis court. However, Staff found no evidence that a Building Permit was ever filed for the construction of the court. They did receive HDC approval (Staff located COA# 58851). The contractor built the court within the 20' side and rear yard setbacks required in the LUG-3. The westerly side yard setback is 15.4', resulting in an intrusion of 4.6' and the northerly rear yard setback is as close as 18', for an intrusion of 2', and therefore not more than 5' into either setback and not closer than 4' from a lot line. As such, the Applicant seeks Special Permit relief pursuant to Bylaw Section 139-16.C(2) which reads:

*The Board of Appeals may grant a special permit to validate unintentional setback intrusions not greater than five feet into a required yard and not closer than four feet from a lot line, provided that it shall first find that the burden of correcting the intrusion substantially outweighs any benefit to an abutter of eliminating the intrusion and, if the intruding structure was so sited after 1990, the siting of the structure was reasonably based upon a licensed survey.*

The definition of Structure pursuant to Section 139-2.A is:

*Anything constructed or erected, the use of which requires a fixed location on the ground. "Structure" shall be construed, where the context allows, as though followed by the words "or part thereof" and shall include, but not be limited to, buildings, retaining walls which support buildings, platforms, steps, antenna towers, steel storage containers, lighthouses, docks, decks, chimneys, tents, and **game courts**. "Structure" shall not include retaining walls not exceeding four feet in height for landscaping purposes, fences, rubbish bins, and a maximum of two aboveground propane tanks not to exceed 120 gallons each.*

The burden of correcting the intrusion would require entirely removing and re-installing the court (which is at grade and to the rear of the lot) and would thus substantially outweigh any benefit to an abutter of eliminating the intrusions.

- 21-16 William Pietragallo, II, Tr. of The 2013 Freedom Trust

Action deadline September 7, 2016

Beaudette

CONFLICTS: LB

9 Fulling Mill Road

Applicant is requesting a finding that a proposed generator enclosure is substantially below grade and, therefore, does not contribute towards ground cover. In the alternative, applicant requests either Special Permit relief pursuant to Zoning Bylaw Section 139-33.A(2) or Variance relief pursuant to Section 139-32 for a waiver of the ground cover ratio provisions in Section 139-16. The Locus is situated at 9 Fulling Mill Road, is shown on Assessor's Map 27 as Parcel 25, and as Lot 3 upon Land Court Plan 14311-K. Evidence of owner's title is registered on Certificate of Title No. 24827 at the Nantucket County District of the Land Court. The site is zoned Limited Use General 3 (LUG-3).

Applicant's representative has provided a very detailed narrative of the zoning and building history of the property (See Pages 140 – 209 of Packet Part III). The property was originally LUG-1 where maximum GCR is 7%, and when so zoned, it met the intensity regulations of LUG-1. It was rezoned in 1990 to LUG-3 where only 3% GCR is allowed, thus rendering the locus pre-existing nonconforming as to lot size and ground cover.

Applicant seeks finding that no relief is necessary by virtue of a determination that the "proposed generator enclosure" is "substantially underground"/ below grade. The new generator requires installation in a pit to be surrounded by a certain type of enclosure to function optimally.

The definition of Ground Cover pursuant to Section 139-2.A is:

*The horizontal area of a lot covered at grade by structures, together with those portions of any overhangs which contain enclosed interior space; excluding tents, retaining walls, **substantially below grade finished or unfinished space**, [...].*

If the generator pit enclosure is **not found** by the Board **to be substantially below grade finished or unfinished space**, then the 187 SF will contribute to the pre-existing nonconforming 6.9% GCR resulting in an increase of GCR up to 7%. In this case, applicant seeks relief pursuant to Section 139-33.A(2) which reads:

*An extension, alteration, or change to an existing structure or a new structure that will result in an increase in the pre-existing nonconforming ground cover ratio of a lot may be allowed through issuance of a special permit, provided that the special permit granting authority makes the following findings:*

- a) The increase in ground cover ratio will not be substantially more detrimental to the neighborhood than the existing nonconformity;*
- b) The resulting ground cover ratio is consistent with the character of the surrounding neighborhood; and*
- c) The extension, alteration, or change to the existing structure or the new structure is conforming to other dimensional requirements of this chapter\*.*

\*The "enclosure" is shown to be sited as close as 16.2' from the northerly side yard lot line where 20' side yard setback distance is typically required. However, pursuant to Section 139-33.E(2)(a):

*For a lot within the provisions of this Section 139-33.E, the dimensional requirements of Section 139-16.A shall apply except as follows:*

- (a) In the LUG-2 and LUG-3 Zoning Districts, the side and rear yard setbacks shall be 10 feet; [...]*

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#### IV. OTHER BUSINESS:

- 66-00

Abrem Quarry (40B)

Discussion of draft Monitoring Services Agreement between Nantucket Zoning Board of Appeals and Nantucket Housing Authority and NHA Properties d/b/a Housing Nantucket.

See Packet  
Part IV

#### **FROM PRIOR STAFF REPORT:**

See Packet Part IV for related materials. This came about as a result of a request for action to be taken to address some grievances by residents the Abrems Quarry 40B. In the process of trying to ascertain who the appropriate monitoring agent actually is, Staff determined that there was a necessity to make a concerted effort to evaluate the recorded documents in order to establish who the monitoring agent is and should be going forward. The Legal opinion, dated April 12<sup>th</sup> (See Pages 9 – 12 in Packet Part IV), found that NHA Properties, d/b/a Housing Nantucket, is and should continue to be the Monitoring Agent. The attorney further asserted that "the form of monitoring services agreement attached to the Regulatory Agreement calls for no payments for services to come from the town. If this provision changes in your agreement, it may implicate requirements under G.L. c. 30B. for procuring services."

In response to this finding, Anne Kuszpa of Housing Nantucket, who has been fielding the complaints which generated this request, submitted a draft Monitoring Services Agreement to Staff (See Pages 14 – 18) on April 13<sup>th</sup>. Staff in turn solicited comments and edits from Town Counsel (See Pages 20 – 25). One concern Town Counsel has is "that Housing Nantucket has proposed collecting a "re-sale fee" of 2.5% of the max sale price. The recorded Deed Riders call for a re-sale fee of  $\frac{3}{4}$  of 1% of the max re-sale price." The Board will need to make a determination as to how to handle this particular matter. There is some urgency to finalizing this Agreement and getting it recorded at the Registry of Deeds to make it a valid document.

#### **UPDATE:**

Since the May 11<sup>th</sup> meeting, staff has closely examined the Comprehensive Permit, the Regulatory Agreement, the Deed Riders, and other relevant documents. Staff has also had multiple exchanges with Town Counsel (Attorney Lee Smith), 40B Consultant Ed Marchant, and Housing Nantucket Exec. Director, Anne Kuszpa who brought this matter to our attention. Staff asks that the proposed Monitoring Agreement be approved as drafted with suggested edits from Town Counsel (found on Pages 27 – 32 in Packet Part IV), pending opinion of DHCD Counsel. Staff is waiting to hear back from Attorney LeClair, Counsel and Fair Housing Specialist with DHCD, who was contacted for her opinion on Town Counsel's recommendation to split the amended re-sale fee 50/50 between the seller and the buyer. Anne Kuszpa is opposed to this. She believes it would be unfair and counterproductive to impose any portion of it on the

buyer, which essentially increases the price paid for the home and involves a greater amount required at closing. Pertaining specifically to the unit that will be placed on the market, HousingNantucket recently calculated the maximum sales price at approximately \$270,000. The current owner of the subject home paid \$241,000. In Anne's estimation, there are funds available in the \$29,000 profit for the seller to comfortably pay the fees (monitoring agent, lottery agent) to enforce the affordable housing restrictions. If the buyer splits the fees, the buyer has to pay more than what was calculated to be affordable for them. She said that HousingNantucket would be opposed to this idea and the fee should be paid by the seller, as is the current status.

See email from Ed Marchant on Page 129 and the most recent version of the MassHousing *Universal Deed Rider* (UDR) on Pages 130 – 144. Ed confirmed that the stated Resale Fee for masshousing projects is 2.5%, although only 2% in case of DHCD LIP (Local Initiative Program) projects. According to the UDR (as indicated on Page 132 in the Definitions sections "Maximum Resale Price"), the Maximum Resale Price can include an add-on for the Resale Fee and other items (approved capital improvements and certain marketing expenses, (e.g; advertising). In some sense, therefore, the Buyer actually ends up paying the Resale Fee.

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V. ADJOURNMENT.